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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1965

NO. 587

BILLY MITCHELL VILLAGE, INC., Petitioner

vs.

NEW YORK LIFE INSURANCE CO., Respondent

PETITION FOR WRIT OF CERTIORARI
To The Court of Civil Appeals For The
Eleventh Supreme Judicial District of Texas
Sitting at Eastland, Texas

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SUBJECT INDEX

	Page
Opinion of the Court Below	2
Statement of Grounds on which Jurisdiction of this Court is Invoked	2
Question Presented	4
Statutes Involved	5
Statement	6
How the Federal Questions were raised	8
Argument	9
Conclusion	14
Prayer	15

LIST OF AUTHORITIES

CASES	Page
United States of America vs. Pine Hills Apartments, Inc., 261 F. 2d 667	4, 9, 10, 12
United States of America vs. Queen's Court Apartments, Inc., 296 F. 2d 534	4, 9, 10 11, 12, 14
View Crest Garden Apartments vs. United States, 281 F. 2d 844	11
CONSTITUTION OF THE UNITED STATES	
Fourteenth Amendment	5, 8
STATUTES	
Title 12, U. S. Code, Section 1702 et seq.	4, 8

Title 12, U. S. Code, Section 1742 5

Title 28, U. S. Code, Section 1257 (3) 2

SUPREME COURT RULES

Rule 19 (1) (a) 3

Rule 19 (1) (b) 3

FEDERAL REGULATIONS

24 C. F. R . 280. 30 (d) (1949 ed.) 4, 5

INDEX OF APPENDICES

		Page
Appendix "A":	Opinion of Court of Civil Appeals	16
Appendix "B":	Judgment of Court of Civil Appeals	23
Appendix "C":	Judgment of the 131st District Court of Bexar County, Texas	24
Appendix "D":	Order of Supreme Court of Texas Refusing Application for Writ of Error	27
Appendix "E":	Order of Supreme Court of Texas Overruling Petitioner's Motion for Rehearing	28
Appendix "F":	Excerpt from Charter of Billy Mitchell Village, Inc.	28
Appendix "G":	Title 12, U. S. Code, Section 1742	29
Appendix "H":	24 C. F. R. 280.30 (d) (1949 ed.)	29

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To The Honorable Supreme Court Of The United States:

Petitioner, BILLY MITCHELL VILLAGE, INC., respectfully petitions this Honorable Court to grant a Writ of Certiorari to the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, sitting at Eastland, Texas, in the above cause, and in support thereof Petitioner shows the Court:

OPINION OF COURT BELOW

The opinion of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas was delivered on February 26, 1965, and is reported in 388 S.W. 2d 243, styled BILLY MITCHELL VILLAGE, INC. vs. NEW YORK LIFE INSURANCE CO. There is no opinion of the Supreme Court of Texas, but it refused, with the notation "no reversible error", Petitioner's Application for Writ of Error on May 26, 1965, and overruled Petitioner's Motion for Rehearing on June 23, 1965.

The opinion of the Court of Civil Appeals is found at Appendix "A". The judgment of the Court of Civil Appeals affirming the judgment of the trial court is found at Appendix "B". The judgment of the trial court, the 131st District Court of Bexar County, Texas, is found at Appendix "C". The order of the Supreme Court of Texas refusing the Application for Writ of Error is found at Appendix "D" and its order overruling Petitioner's Motion for Rehearing is found at Appendix "E". The various judgments are also found in the Transcript of the Record.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Honorable Court is based upon the Acts of Congress of June 25, 1948, c. 646, 62 Stat. 929, Title 28, U.S. Code, Sec. 1257 (3), providing that this Court may, by Writ of Certiorari, review a final judgment or decree rendered by the highest court of the State in which a decision could be had, where any title, right or privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

This suit was originally instituted by Petitioner against Respondent for a declaratory judgment to determine whether or not its note held by Respondent was in default and for an injunction to restrain a foreclosure sale under a deed of trust and the judgment appealed from was rendered on Respondent's cross-action on the promissory note and for foreclosure of its deed of trust. Petitioner sought an accounting of a reserve account which it had set up with Respondent and in which it had deposited in excess of $198,500.00, which money, it alleged, had been used or invested by Respondent without an accounting therefor. The trial court rendered a final summary judgment in favor of Respondent on said note and for foreclosure of said deed of trust without requiring Respondent to make an accounting with reference to said reserve account and without giving Petitioner credit on said judgment for the amount thereof.

The opinion and judgment of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, sitting at Eastland, sought to be reviewed hereby, which were rendered on February 26, 1965, and are set out in Appendices "A" and "B", constitute a final judgment of the highest court of Texas in view of the Texas Supreme Court's refusal to entertain jurisdiction on May 26, 1965, (Appendix "D"), and overruling Petitioner's Motion for Rehearing on June 23, 1965, (Appendix "E").

Petitioner invokes the jurisdiction of this Court under Supreme Court Rule 19 (1) (a) and (b). The Court of Civil Appeals has decided a federal question of substance not heretofore determined by this Court, and has so far departed from the accepted and usual course of judicial proceedings, and has sanctioned a decision of a lower court which has so far departed from the accepted and usual course

of judicial proceedings, as to call for an exercise of this Court's power of supervision.

The State court's decision was based upon two decisions by the United States Court of Appeals, one, *United States of America vs. Queen's Court Apartments, Inc.*, 296 F. 2d 534, by the Court of Appeals from the Ninth Circuit, and the other, *United States of America vs. Pine Hill Apartments, Inc.*, 261 F. 2d 667, by the Court of Appeals for the Fifth Circuit, neither of which Court of Appeals decision was appealed to this Court. They, as in this case, involve an interpretation of regulations promulgated by the Federal Housing Commissioner under the National Housing Act, Title 12, U. S. Code, Sections 1702 et seq., which regulations are found in 24 C.F.R. 280. 30 (d) (1949 ed.). Petitioner's rights under the Fourteenth Amendment to the Constitution of the United States were violated in that the decision of the Texas Court of Civil Appeals based upon the two decisions of the United States Court of Appeals had the effect of depriving Petitioner of its property without due process of law.

Petitioner is a Texas corporation which was organized for the purpose of constructing and operating a rental housing project under the provisions of the National Housing Act, as amended, and its charter contains a provision to the effect that so long as any property of the corporation is encumbered by a mortgage or deed of trust insured by the Federal Housing Commissioner, the corporation shall engage in no business other than the construction and operation of a rental housing project or projects. (Appendix "F").

QUESTION PRESENTED

The question involved in this case is whether or not the summary judgment rendered against Petitioner on its note

and for foreclosure of its deed of trust was proper and did not violate its constitutional rights when the trial court refused to require an accounting and allow a credit on the judgment of a sum in excess of $198,500.00, which Petitioner had deposited with Respondent as a reserve for replacements, which sum Petitioner alleged Respondent had used and invested without accounting therefor.

STATUTES INVOLVED

The Statute involved is Section 1742, Title 12, U. S. Code (Appendix "G") and the regulations issued by the Federal Housing Commissioner in pursuance thereof, 24 C. F. R. 280.30 (d) (1949 ed.). (Appendix "H").

The Fourteenth Amendment to the Constitution of the United States is involved wherein it is provided: "nor shall any State deprive any person of life, liberty or property, without due process of law."

STATEMENT

Petitioner, in its First Amended Original Petition, (Tr. Page 74), sought a declaratory judgment against Respondent to determine the amount it actually owed Respondent on a promissory note in the original principal sum of $3,220,200.00, secured by a deed of trust upon real property owned by Petitioner. Petitioner alleged that it had voluntarily established with Respondent a reserve fund for replacements and had paid Respondent, in addition to principal and interest on said note and a reserve for taxes and insurance, a sum in excess of $198,500.00, which sum was being held by Respondent, but belonged to Petitioner, and that Respondent had invested part or all of said reserve fund or had used same for its own benefit over a period of years, without ever making

an accounting to Petitioner with reference thereto and Petitioner did not know the exact amount of such fund. (Tr. Pages 73-74).

Petitioner prayed for a declaratory judgment against Respondent requiring an accounting of its reserve fund and adjudicating the amount due on its promissory note. (Tr. Page 77).

Respondent, in its cross-action against Petitioner, alleged the execution and delivery of Petitioner's note, deed of trust and chattel mortgage, the transfer and assignment thereof to Respondent, Petitioner's failure to pay the installments provided in said note, and the placing of said note in the hands of its attorneys for collection; and prayed for judgment for the amount of the unpaid balance, together with interest and attorney's fees, and for foreclosure of said deed of trust and chattel mortgage. (Tr. Pages 1-4).

Petitioner answered said cross-action by a general denial and further alleged that its note held by Respondent was not in default because Petitioner had on deposit with Respondent the sum of approximately $198,500.00, which belonged to Petitioner. (Tr. Pages 19-20).

Respondent filed a motion for summary judgment based upon the pleadings, the affidavits of C. T. MACLEOD and R. R. ARNOLD and certified copies of Petitioner's charter and amendment thereto. (Tr. Pages 21-22).

Petitioner replied to Respondent's Motion for Summary Judgment and alleged that there was an issue of fact as to the amount of money owed to Respondent by Petitioner and as to whether or not the promissory note sued upon by Respondent was actually in default. (Tr. Page 79).

Petitioner further pointed out in its reply that the affidavit of R. R. ARNOLD made no reference to the sum in excess of $198,500.00 belonging to Petitioner which was held by Respondent. (Tr. Pages 79-80).

The District Court granted Respondent's Motion for Summary Judgment and entered a final judgment against Petitioner for the sum of $2,445,084.07, for attorney's fees and for foreclosure of the deed of trust lien without requiring an accounting of the reserve fund, without adjudicating the amount thereof and without allowing credit therefor on said judgment, to which judgment Petitioner excepted. (Tr. Pages 85-88) (Appendix "C").

Petitioner perfected its appeal to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas and said cause was thereafter transferred to the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas.

The Honorable Court of Civil Appeals held that it was not inequitable to order a foreclosure of Petitioner's deed of trust without requiring Respondent to make an accounting of Petitioner's reserve fund and to give credit therefor on said judgment and permitted Respondent to hold the reserve fund until after the foreclosure sale; and affirmed the judgment of the trial court on the 26th day of February, 1965, (Appendix "B"), and thereafter on the 19th day of March, 1965, overruled Petitioner's timely filed Motion for Rehearing.

Petitioner, in due time, filed its Application for Writ of Error, in the Supreme Court of Texas and on the 26th day of May, 1965, the Supreme Court refused Petitioner's Application for Writ of Error, no reversible error, (Appendix "D"), and on June 23, 1965, overruled Petitioner's Motion for Rehearing. (Appendix "E").

In its Motion for Rehearing in the Supreme Court of Texas, Petitioner specifically alleged that it had been denied due process of law when a final judgment was rendered against it and was permitted to stand, in which no determination was made on its claim for more than $198,500.00, which it had voluntarily deposited with Respondent, and no credit was given on the judgment for the amount thereof.

HOW THE FEDERAL QUESTIONS WERE RAISED

Petitioner, in its First Amended Original Petition, in its answer to Respondent's Cross-Action, and in its Reply to Respondent's Motion for Summary Judgment, alleged that its deposits to the reserve fund for replacements were not required by the note or deed of trust, were a voluntary deposit and that no final judgment could be rendered without making a proper accounting thereof and credit given therefor.

The determination of the issue was dependent upon an interpretation of the regulations promulgated by the Federal Housing Commissioner in pursuance of Section 1742 of the National Housing Act, Title 12, U. S. Code, Section 1702 et seq.

Petitioner's corporate charter was introduced in evidence in the trial court and was included in the Transcript in the Court of Civil Appeals. The charter provided that the corporation was organized for the purpose of constructing and operating a rental housing project under the provisions of the National Housing Act, as amended, and that the corporation could not engage in any business other than the construction and operation of a rental housing project so long as any of its property was encumbered by a mortgage or deed of trust insured by the Federal Housing Administration. (Appendix "F").

Petitioner, in the District Court, in the Court of Civil Appeals and in the Texas Supreme Court, raised the point that the decisions of the United States Courts of Appeals in *United States of America vs. Pine Hills Apartments, Inc.* and *United States of America vs. Queen's Courts Apartments, Inc.* were not correct, and even if correct, they were distinguishable from the case at bar.

In its Motion for Rehearing in the Supreme Court of Texas, Petitioner alleged that it had been denied due process of law when a final judgment was rendered against it in which no determination was made or credit allowed for more than $198,500.00, which it had voluntarily deposited with Respondent and which was in the hands of Respondent at the time that the judgment was rendered.

ARGUMENT

The decision of the Court of Civil Appeals in this case was based primarily upon two cases by the United States Courts of Appeals, *United States of America vs. Pine Hill Apartments, Inc.*, 261 F. 2d 667, by the United States Court of Appeals for the Fifth Circuit, and *United States of America vs. Queen's Court Apartments, Inc.*, 296 F. 2d 534, by the United States Court of Appeals for the Ninth Circuit, from which latter case the Court of Civil Appeals quoted at length. Neither of these cases was appealed to this Honorable Court. Petitioner respectfully submits that these decisions by the United States Courts of Appeals are erroneous and should not be the law of the land.

In this case, the Texas Court of Civil Appeals has affirmed a judgment in favor of Respodent against Petitioner for the sum of $2,445,084.07, together with interest and attorney's fees, and has ordered a foreclosure of Petitioner's deed

of trust when the record shows that Petitioner had on deposit with Respondent a sum in excess of $198,500.00, for which no accounting had been made and the Court refused to require such an accounting and refused to give Petitioner credit for the amount that was on deposit with Respondent.

The Honorable United States Court of Appeals saw no inequity in the fund being held by the mortgagee until after the foreclosure sale and the Texas Court of Civil Appeals followed this holding. *But, what about Petitioner's right to discharge its entire indebtedness before foreclosure? How much money did Petitioner have to pay Respondent in order to satisfy the judgment? Petitioner submits that it was neither fair nor equitable to require it to pay or arrange to pay the entire indebtedness when it had in excess of $198,500.00 in the hands of Respondent, for which no accounting had been made and no credit allowed.*

While the Courts of Appeals were probably correct in holding that the reserve fund could not be used to take care of delinquent note payments without the approval of the Federal Housing Commissioner, *they were in error in holding that the mortgagee could retain the reserve fund until after the foreclosure sale and then apply it toward any deficiency in the amount obtained at the foreclosure sale. The Court in these cases assumed that the indebtedness would not be paid and that a foreclosure sale would be held, but it did not properly determine the amount that the mortgagor would have to pay in order to avoid the foreclosure.*

The decision in the *Queen's Court Apartments* case was based upon the earlier case of *United States of America vs. Pine Hill Apartments, Inc.* We can understand the reason for the Court's decision in that case, for there the stockholders

of the corporation, as intervenors, were seeking to have the reserve fund turned over to them in payment of their own claims against the corporation, which was apparently insolvent; and if the reserve fund had been turned over to them and a deficiency existed after the foreclosure sale, the money would have been lost to the United States of America. In the *Queen's Courts Apartments* case, the mortgagor corporation was apparently attempting to get hold of the reserve fund held by the Federal Housing Administration so that it could pay debts other than the note indebtedness. The Court of Appeals in its decision made it clear that there were good reasons for holding that federal policy requires affording every reasonable protection to the security of federal investment, citing *View Crest Garden Apartments* vs. *United States,* 281 F. 2d 844. Petitioner has no complaint with this policy.

But that is not the situation in the case at bar. No attempt was made to have the reserve account turned over to Petitioner or its shareholders. Petitioner simply asked for an accounting of the reserve fund and a credit on its note obligation so that it could make arrangements for the payment of the note indebtedness without having to pay the additional amount that was already on deposit. The failure to require an accounting and a credit on the indebtedness constituted a deprival of Petitioner's property without due process of law.

While it is true that Petitioner's charter required the establishment of a reserve fund for replacements, and provided that disbursements from such fund, whether for the purpose of effecting replacements of structural elements, furnishings and mechanical equipment of the project, or for any other purpose, may be made only after receiving the consent in writing of the holders of the "First Preferred" stock, which was the Federal Housing Administration, it is nevertheless

true that upon payment of said note, no one other than Petitioner — not Respondent, not the Federal Housing Administration, not the United States of America — had any interest in or right to said reserve fund except Petitioner; and it was unfair, inequitable and a denial of due process for the judgment in this case not to include a determination of the amount of Petitioner's money held by Respondent and an allowance of credit to Petitioner on such judgment for such amount.

Even if the decisions of the United States Courts of Appeals in *United States of America vs. Pine Hill Apartments, Inc.* and *United States of America vs. Queen's Court Apartments, Inc.* are correct — and Petitioner strongly urges that they are not — there are material differences between the facts in this case and those cases which would require the Court of Civil Appeals not to follow them, but the Court of Civil Appeals failed to distinguish the cases.

The controversy in this case is between Petitioner and Respondent; neither the United States of America nor the Federal Housing Administration is involved. In both of the federal cases, the United States was the party trying to protect its interests. That is not the situation here. In each of the two federal cases, although there was no provision in the mortgage requiring the reserve fund, there was before the Court an application for FHA insurance signed by both the mortgagor and the mortgagee in which the mortgagee represented that it would require such a reserve fund. No such instrument was before the Court in this case. A fact issue was raised in this case that the amount of the reserve fund was unreasonably high and considerably more than was necessary to meet the requirements of the Federal Housing Administration in order to take care of repairs or replacements.

There was no such issue raised in either of the two federal cases.

The record in this case reflects that there is nothing in the note, the deed of trust or the chattel mortgage requiring the establishment or maintenance of a reserve fund. As between the parties to this controversy, the fund was established voluntarily by Petitioner and the deposits to the reserve fund were made by Petitioner without any obligation upon its part to do so. Therefore, the control of the reserve fund as between Petitioner and Respondent was in Petitioner. If its requested application of part of the reserve fund to the note payments then due had been made, there would not have been any default on Petitioner's note obligation.

It is true that Petitioner's charter required the establishment and maintenance of a reserve fund, but it also provided for the consequences upon failure to do so. It simply authorized the holders of the "First Preferred" stock, the Federal Housing Administration, upon such default to remove all existing directors of the corporation and to elect new directors in their stead, until such default was cured. The charter prohibited the corporation from retiring any part of the "Second Preferred" stock or paying any dividends on any of the capital stock until after the establishment and maintenance of the reserve fund for replacements. These are the only provisions with reference to the reserve fund which are found in the charter. They are not mentioned in the note or deed of trust or any other instrument before the Court.

In each of the two federal cases cited, the note secured by FHA insurance had been transferred to the Federal Housing Administration and suit was instituted by the United States of America in trying to protect its interests. It had a right

to enforce the charter provisions, and the mortgagor in order to obtain FHA insurance had committed itself in writing to set up such a reserve account. In this case, Respondent had the right to tranfer its note to the Federal Housing Administration and let the United States of America enforce the obligation, but it chose to do otherwise.

In each of the federal cases, the question was raised in preliminary proceedings and no final judgment was rendered. In this case, the judgment is final.

It is earnestly submitted that neither Respondent nor the Federal Housing Administration nor the United States of America could possibly have been prejudiced in any way if the trial court had required an accounting of the reserve account and had given Petitioner credit for the amount thereof — not a cash refund, as was ordered by the trial court in the *Queen's Court Apartments* case, but a credit on the judgment, to which Petitioner was legally and morally entitled. That could have made the difference between payment and foreclosure, between protecting an equity and losing an investment.

CONCLUSION

Petitioner respectfully submits that it has been deprived of a valuable property right without due process of law and that the result was brought about by two erroneous decisions of the United States Courts of Appeals from which no appeal was taken. This Honorable Court has not passed upon the precise question involved. The proper interpretation of the regulations issued under Federal Statutes should be determined by this Court.

Petitioner urges this Honorable Court to require Respondent to account to Petitoiner for the amount of Petitioner's

money in the hands of Respondent, and to first credit and reduce by the sum thereof the amount of the judgment to be rendered against Petitioner *before* granting and entering said judgment; even more so, because there is no right of redemption after foreclosure in Texas. Petitioner is entitled to a judicial determination of the amount of such credit *before* rendition of such judgment, and such determination cannot properly, under due process of law, be had *after* the rendition of a final judgment. Justice can be done in this case only if the judgment against Petitioner is set aside and a new trial ordered.

PRAYER

WHEREFORE, Petitioner respectfully prays that this Honorable Court grant its petition for Writ of Certiorari to review the record and the opinion of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, and that upon such review, the judgments of the State courts be reversed and Petitioner be granted a new trial.

Respectfully submitted,

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APPENDIX "A"
OPINION OF COURT OF CIVIL APPEALS

BILLY MITCHELL VILLAGE, INC.,
Appellant

vs. No. 3928

NEW YORK LIFE INSURANCE COMPANY,
Appellee

Appeal from the 131st District Court of Bexar County.

Billy Mitchell Village, Inc. brought this suit against New York Life Insurance Company, a corporation, P. N. Brownstein, Commissioner of the Federal Housing Administration and Eugene M. Zuckert, Secretary of the Air Force, seeking a declaratory judgment determining whether a note executed by plaintiff was in default. Plaintiff also sought an injunction to restrain a foreclosure sale under a deed of trust to satisfy the indebtedness evidenced by such note, which plaintiff admitted having executed but alleged was not in default. The defendant New York Life Insurance Company filed a cross action against plaintiff, alleged that it was the owner of the note and sought to recover the balance due thereon and to foreclose its deed of trust. Plaintiff Billy Mitchell Village, Inc. filed an amended petition and in addition to the relief previously sought prayed for damages for an alleged conspiracy on the part of New York Life Insurance Company, the Federal Housing Commissioner and the Secretary of the Air Force, jointly and severally. The defendant New York Life Insurance Company filed a motion for summary juddgment on its cross action, which was granted, and, on January 8, 1964, judgment was entered against plaintiff for the sum of $2,445,084.07, the amount found to be due

on the note, for attorney's fees and for foreclosure of the deed of trust lien. Thereafter on March 12, 1964, the court ordered that the cross action of defendant New York Life Insurance Company be severed from that portion of plaintiff's suit seeking damages for alleged conspiracy on the part of the defendant insurance company and other named defendants, and ordered that the summary judgment on defendant's cross action rendered on January 8, 1964, be made final. Plaintiff Billy Mitchell Village, Inc. has appealed.

The record shows that the note sued upon was dated July 21, 1949, and in the original amount of $3,220,000.00; that by its terms the principal and interest thereon was payable in monthly installments beginning January 1, 1951 and ending July 1, 1983. The note provided that if any default in payment was not made good prior to the date of the next installment, said note at the option of the holder should become immediately due and payable without notice and that the lien securing same might be foreclosed. The note was secured by a deed of trust containing similar provisions as to the acceleration without notice and provided further for the deposit of sums of money for mortgage insurance pursuant to the National Housing Act, taxes and insurance. It is undisputed, subject to qualifications as hereinafter indicated, that appellant defaulted on payments due on the note after May 20, 1963 and that the principal balance due on said note was the sum of $2,445,084.07 with interest thereon at the rate of 4% per annum from May 1, 1963. The Federal Housing Administration insured the note upon which this suit is based and became the owner of all the first preferred stock of appellant.

The record shows that an amendment to appellant's charter provides for a reserve fund for replacements to be created

by additional payments in the amount of $1,547.64 per month over the life of the mortgage to be deposited with the mortgagee. The charter amendment further provides that no disbursements from this fund may be made without the written consent of the Federal Housing Commissioner, the holder of the first preferred stock. It was established by affidavit that the Federal Housing Administration had not consented to any disbursement of said reserve fund to be applied to the principal and interest due and payable under the terms of the note upon which this suit was based.

Appellant asserts and shows that in addition to the payment of the principal and interest on said note and a reserve deposit for taxes and insurance that it has paid to appellee as a reserve for replacements under the charter provision in excess of $198,500.00 which sum is held by appellee but belongs to appellant and that appellee has invested part or all of said reserve fund or has used same for its own benefit over a period of years and has never made any accounting to appellant; that said reserve account was more than sufficient to take care of the claimed delinquent installments and that after applying said reserve to payments or installments then due there would still remain more than a reasonable amount to take care of replacements or repairs which might be needed for the property covered by the deed of trust. Appellant asserts that appellee has failed and refused to apply the amount of the reserve held by it to the payment of appellant's note and that appellee claims it has no authority to use said reserve for that purpose; that the Commissioner of the Federal Housing Administration has claimed that he could not authorize the application of the reserve to the payment of the said note unless requested to do so by appellee, and that if the consent of said Commissioner or the

request of appellee were required the Commissioner wrongfully withheld such permission and appellee wrongfully failed to make such request and that the withholding of such permission and request of said parties was part of a conspiracy to acquire appellant's property for the United States without the payment of just compensation.

Appellant urges points contending that the court erred in granting appellee's motion for a summary judgment; that it was the duty of the court to hear evidence, require an accounting by appellee and make a determination as to the amount owed by appellant before it ordered a foreclosure sale. Appellant contends that there was an issue of fact as to whether or not its note was in default; that appellant had set up a reserve account with appellee for replacements which had accumulated in excess of $198,500.00 at the time of the trial which was more than adequate to take care of all payments on the note then due and leave an amount sufficient to cover all necessary replacements; that the reserve account for replacements was not required by the terms of the deed of trust held by appellee, nor was there any other contract between appellant and appellee which required appellant to set up and maintain such a reserve account for the benefit of appellee; that such reserve account for replacements was required by appellant's charter provision and was a matter wholly between the Federal Housing Administration and appellant, and did not in any way affect the note or deed of trust in question. Appellant, therefore, contends that it was entitled to withdraw such reserve account funds in excess of that required for all necessary replacements, and to apply same to the payment of its note, and that the court erred in not so holding, and in granting appellee's motion for summary judgment.

Appellant by its pleadings had admitted the execution and delivery of the note and deed of trust which is the basis of appellee's cross action. Appellant also admits that such note and deed of trust have been duly transferred to appellee. Appellant's pleadings also show the establishment of the "reserve for replacements account" provided for in appellant's charter provision, that there was in excess of $198,500.00 in this account, and that appellant requested appellee to apply part of such funds to the unpaid installments due on the note in question. Appellant's pleadings also indicate that its housing units have been about one-third occupied, causing appellant to be unable to make the payments provided for in its note held by appellee New York Life Insurance Company.

Appellant filed one affidavit in opposition to appellee's motion for summary judgment. This affidavit sets out that a request was made to appellee to apply the "replacement" reserve account of Billy Mitchell Village, Inc. on deposit with appellee New York Life Insurance Company to the note indebtedness of appellant and that appellee refused such request. The note held by appellee was thus admittedly in default unless appellant's contention concerning the application of a portion of the "reserve for replacements account" is well taken. In this connection it is noted that there is an express provision in appellant's charter that "Disbursements from such fund, whether for the purpose of effecting replacements of structural elements, furnishings and mechanical equipment of the project, or for any other purpose, may be made only after receiving the consent in writing of the holders of the 'First Preferred' stock." It is undisputed that the Federal Housing Administration is the owner and holder of the "First Preferred" stock and that that agency has not, in

writing or otherwise, consented to such an application of the reserve fund held by appellee as a replacement account. Appellant's contention that there should be such an application of the reserve account to past due payments and that its note is therefore not in default is not well taken. United States of America vs. Pine Hills Apartments, Inc., 261 F. 2d 667; United States of America vs. Queen's Court Apartments, Inc., 296 F. 2d 534. In both of the above cited cases there were charter provisions in the defendant's corporation's charter substantially the same as the charter provision here under consideration. In the last cited case it is stated in the court's opinion as follows:

> "We believe that the Pine Hill case supports the contention of appellant that it was not required to use the replacement fund to make up the payments which were delinquent upon the note, and that it was not required to credit the mortgagor with the funds in this reserve replacement fund prior to the time for determination of whether or not there was a delinquency after the foreclosure sale.
>
> We also agree with the second contention made by the government that the government had a right to hold these funds as a set-off against any possible amount due the government after a foreclosure sale. In fact, appellee concedes that the government has a right of set-off, its contention being that the government has no right to choose the time at which it will apply the funds in its hands as a set-off. We cannot agree with appellee's contention in this regard. The payment of the funds in the replacement fund was a condition upon which the money was originally loaned. If the government was required to use these funds to wipe out any possible monthly delinquent payments as they became due, the replacement fund could be wiped out very quickly and any value that arises from requiring such a fund would be dissipated.

> We hold that the appellant was not required to return the funds held in the replacement fund prior to foreclosure and that the district court was in error in so conditioning its order of foreclosure. We disagree with appellee's contention that equity required the payment of this fund to appellee prior to foreclosure. We see no inequity in the fund being held by appellant until after the foreclosure sale. If there is then a deficiency in the amount due to appellant the funds can properly be applied toward reducing such deficiency. If there is no deficiency, the claim of appellee to such funds can then be recognized and any portion thereof to which appellee may be entitled may be paid to it."

Appellant contends and the record shows that this case was submitted to the court upon appellee's motion for summary judgment on its suit on the note and for foreclosure of the deed of trust. No motion for severance was made. The court granted appellee's motion for summary judgment but did not at the time order a severance. Thereafter, subsequent to the filing of appellant's motion for new trial on the summary judgment, the court ordered a severance of appellee's cross action from appellant's suit against appellee, the Federal Housing Commissioner and the Secretary of the Air Force, and it was provided that the latter cause would thereafter bear a different number on the docket of the court. The order of severance further provided that the summary judgment previously rendered be made final.

We overrule appellant's fifth point in which it is urged that since the court granted a summary judgment without at the same time severing appellee's cross action seeking damages for alleged conspiracy, it was error for the court to thereafter grant a severance. The summary judgment was not final until it was severed. The order of severance confirmed the previous order granting appellee's motion for

summary judgment. The effect of the severance was to make the summary judgment final and appealable. Craig vs. Rio Grande Electric Cooperative, 346 SW 2d 438, (Ref. N.R.E.); Sears vs. Mund Boilers, Inc., 328 SW 2d 199, (Writ Ref.); Pierce vs. Reynolds, 160 Texas 198, 329 SW 2d 76; Hamilton vs. Hamilton, 154 Texas 511, 280 SW 2d 588.

The judgment is affirmed.

CECIL C. COLLINGS
Associate Justice.

February 26, 1965.

APPENDIX "B"

JUDGMENT OF THE COURT OF CIVIL APPEALS

No. 3928

BILLY MITCHELL VILLAGE, INC.

vs.

NEW YORK LIFE INSURANCE COMPANY,

From the 131st District Court
of Bexar County.
Opinion by COLLINGS, A. J.

This cause came on to be heard on the transcript of the record and, the same being inspected, it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court be, and the same is hereby, in all things affirmed. It is further ordered that all costs incurred by reason of this appeal be, and the same are hereby, taxed against Appellant, BILLY MITCHELL VILLAGE, INC., principal, and MARYLAND CASUALTY COMPANY, surety, on its appeal bond, for which let execution issue, and that this decision be certified below for observance.

February 26, 1965

APPENDIX "C"

JUDGMENT OF 131st DISTRICT COURT OF BEXAR COUNTY, TEXAS

No. F-157,292

BILLY MITCHELL VILLAGE, INC.

vs.

NEW YORK LIFE INSURANCE COMPANY ET AL

IN THE DISTRICT COURT
131st JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

ORDER GRANTING CROSS PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On December 27, 1963 came on to be heard Cross Plaintiff's motion for summary judgment herein and came the parties hereto and the Court finding that Cross Plaintiff's motion for summary judgment was properly and timely served and having considered such motion and the reply thereto of Cross Defendant together with the other pleadings, affidavits and exhibits herein finds that Cross Plaintiff's motion for summary judgment should be granted.

It is accordingly ORDERED, ADJUDGED and DECREED that cross plaintiff, NEW YORK LIFE INSURANCE COMPANY, have and recover of and from the cross defendant, BILLY MITCHELL VILLAGE, INC., the sum of Two Million Four Hundred Forty Five Thousand Eighty Four Dollars and Seven Cents ($2,445,084.07) together with four percent (4%) interest thereon from May 1, 1963 to January 8th, 1964, the date of this judgment; that Cross Plaintiff

further have and recover of and from cross defendant, Billy Mitchell Village, Inc., the sum of One Hundred Twenty Two Thousand Two Hundred Fifty Four Dollars and Twenty Cents ($122,254.20) as attorney's fees, together with interest on all of said sums at the rate of six percent (6%) per annum from the date of this judgment until paid and all costs of suit. It is further ORDERED, ADJUDGED and DECREED that the deed of trust lien of cross plaintiff, New York Life Insurance Company, be, and is hereby, foreclosed on the following described property situated in Bexar County, Texas (as such lien existed on July 1, 1949), to-wit:

> Two (2) contiguous tracts out of Woodward Gardens: (1) A tract of 35.29 acres comprised of parts of Lots 13 through 22; (2) A tract of 0.562 acre for sixty (60) foot roadway across Lots 21 and 22, all out of Woodward Gardens, OCL 7 and 8, Range 2 and 3, County Block 5639, in San Antonio, Bexar County, Texas,

such property being more fully described in the deed of trust from Billy Mitchell Village, Inc., to Howard F. Sunshine, recorded in Volume 2712, on pages 327-333, of the Deed of Trust Records of Bexar County, Texas, together with all improvements thereon and all fixtures and personal property attached to or used in and about the buildings erected on such real property; all being the same property described and conveyed by the aforesaid deed of trust.

It is further ORDERED, ADJUDGED and DECREED that the lien of the cross plaintiff, New York Life Insurance Company, on the rents in the hands of the Receiver appointed in this case be, and it is hereby, foreclosed.

It is further ORDERED, ADJUDGED and DECREED that the chattel mortgage lien of cross plaintiff, New York Life

Insurance Company, be, and it is hereby foreclosed on the following described personal property:

408 Welbilt Gas Ranges;
408 Frigidaire Refrigerators;
36 Bendix Washing Machines;

3448 Venetian Blinds of the following sizes:
2356 size 3' - 1" x 5' - 3"; 276 size
4' - 5" x 5' - 3"; 408 size 1' - 7" x 3' - 2";
and 408 size 3' - 1" x 3' - 2",

such property being located in the buildings on the real property described in said deed of trust and being the personal property more fully described in the Chattel Mortgage dated July 13, 1950 from Billy Mitchell Village, Inc. to Manufacturers Trust Company, recorded in Volume 280, at page 200, of the Chattel Mortgage Records of Bexar County, Texas.

It is further ORDERED, ADJUDGED and DECREED that an order of sale shall issue to the sheriff or any constable of the State of Texas directing him to seize and sell the same as under execution in satisfaction of this judgment and if the property cannot be found or the proceeds of such sale be not sufficient to satisfy this judgment, then to make the money or any balance thereof remaining unpaid out of any other property of the Cross Defendant as in case of ordinary execution and further that such order of sale shall have all the force and effect of a writ of possession as between the parties to this suit and any person claiming under the said Cross Defendant by any right acquired pending this suit; and the sheriff or other officer executing such order of sale shall proceed by virtue thereof to place the purchaser of the property sold thereunder in possession of said property within thirty (30) days after the date of the sale.

To which judgment of the Court Cross Defendant duly excepted.

RENDERED AND SIGNED this 8th day of January, 1964.

SOLOMON CASSEB, JR.
District Judge, Presiding

APPROVED AS TO FORM:
GEORGE H. SPENCER,
Attorney for Cross Plaintiff
JAY SAM LEVEY,
Attorney for Cross Defeindant

APPENDIX "D"

ORDER OF SUPREME COURT REFUSING APPLICATION FOR WRIT OF ERROR

No. A-10, 756

BILLY MITCHELL VILLAGE, INC.

vs.

NEW YORK LIFE INSURANCE COMPANY

FROM BEXAR COUNTY,
ELEVENTH DISTRICT.

Application of Petitioner for Writ of Error to the Court of Civil Appeals for the Eleventh Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that Applicant, BILLY MITCHELL VILLAGE, INC., and surety, MARYLAND CASUALTY COMPANY, pay all costs incurred on this application.

May 26, 1965

APPENDIX "E"

ORDER OF SUPREME COURT OVERRULING PETITIONER'S MOTION FOR REHEARING

No. A-10, 756

BILLY MITCHELL VILLAGE, INC.

vs.

NEW YORK LIFE INSURANCE COMPANY

FROM BEXAR COUNTY,
ELEVENTH DISTRICT.

Petitioner's Motion for Rehearing of Application for Writ of Error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

June 23, 1965

APPENDIX "F"

EXCERPT FROM CHARTER OF BILLY MITCHELL VILLAGE, INC.

The business and objects to be carried on and promoted by it are as follows:

. . . . . .

(d) To apply for and obtain or cause to be obtained from the Federal Housing Commission (hereinafter called the Commissioner) a contract or contracts of mortgage insurance pursuant to the provisions of the National Housing Act as amended, covering bonds, notes and other evidences of indebtedness issued by this corporation and any indenture of Mortgage or Deed of Trust securing the same. So long as any property of this corporation is encumbered by a mortgage or Deed of Trust insured by the Commissioner it shall engage in no business other than the construction and operation of a Rental Housing Project or Projects.

APPENDIX "G"

TITLE 12, U.S. CODE, SECTION 1742. RULES AND REGULATIONS

The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter.

APPENDIX "H"

24 C.F.R. 280.30 (d) (1949 ed.)

A reserve for replacement shall be accumulated and maintained with the morgagee so long as the morgage insurance is in force, and the amount and types of such reserves and conditions under which they shall be accumulated, replenished and used, shall be specified in the regulatory agreement or charter. Failure to comply with the terms of this requirement may be considered by the Commissioner as a default under the terms of the regulatory agreement or charter.